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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-940

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

No. 74-949

MARY AKIN, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONER'S REPLY MEMORANDUM TO THE BRIEF IN OPPOSITION

(List of Counsel on page 2 of cover)

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The court below depended heavily on an isolated portion of the legislative history of the McCarran Amendment as refuting any Congressional intention to exclude federal court jurisdiction under 28 U.S.C. 1345 over water rights administration and adjudication matters (Pet. App. 8a). The government likewise, in support of the circuit's opinion, relies heavily upon this

same extract from the debates (Brief in Opp. 7) as follows:

> S. 18 is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.

We respectfully submit that both the court below and the government misconstrue this piece of legislative history. In reaching for the point they overlook completely the clear import of this extract which embodies the full thrust of the McCarran Amendment, namely that all parties having claims, and all of their claims, should be joined in properly instituted state proceedings, for otherwise ". . . any subsequent decree would be of little value."

This Court has already put this in proper context in its decision in *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520 where it used the very same quote in rejecting the government's argument that a general adjudication was not involved. To the contrary, this Court said, the United States must submit all of its claims in those proceedings because "The whole community of claims is involved . . ." (401 U.S. at 525).

As the government notes, the district court did not resolve this jurisdictional question (Brief in Opp. 5), nor, we submit, need this Court resolve it here. The fact remains that the United States has been served in the proceedings in Water Division 7, and pursuant to the McCarran Amendment and this Court's decisions,

should submit its claims in that water court, as an essential part of the whole community. It was this practical reality, to the end that there would not be two separate proceedings and two separate decrees involving the same water, that very appropriately brought the decision to abstain.[1]

The suspicion that the government itself voiced in the *Eagle County* and *Water Division 5* litigation concerning fair treatment in state proceedings which this Court rejected out of hand lingers on in the government's discussion of their claims to water for use on Indian lands. There is nothing in either of the decisions below holding that such claims must be adjudicated in the federal courts. What is more clear than ever from the government's argument is that there would be duplicate proceedings with the government, indeed, contending that it would be a simple matter for a special master to sit in the same region where a water court is already sitting and presiding over the same water and in many instances over the same claims.

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[1] The citation to the seven New Mexico cases (Brief in Opp. p. 9) is not persuasive since all save *Molybdenum Corp.* (a special situation) were filed before this Court's decision in *Eagle County*, which clarified the reach of McCarran. We are advised that since *Eagle County*, New Mexico has filed two proceedings in their state courts both involving claims to waters for Indian lands, one of which involves water rights in New Mexico claimed on behalf of one of the Ute Indian Tribes here involved. Removal of one of these cases is being contested through remand proceedings. In addition, the Pueblo Indian Tribes in New Mexico own their properties in their own right and claim their water rights as aboriginal, a situation possibly making 28 U.S.C. 1360(b) applicable thereto, as opposed to reserved rights held in trust, for the Ute Indians in Colorado, and New Mexico through reservation by the United States. With regard to the State of Washington cases, we are advised that these are exceptions there rather than the rule; that since 1964 the United States has adjudicated reserved rights in state courts in that State.

This would not only result in mal-administration of this precious resource but would make a shambles out of the Congressional intent in enacting the McCarran Amendment.[2]

The decision of the district court to abstain was clearly correct and the decision below to remand the case should be reversed, without more.

Respectfully submitted,

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[2] The United States has not served any named defendants in this action. The only present parties, other than the United States, are the intervenors. The federal decree the United States requests on the San Juan River would supplant prior state decrees, and would force disputes on the administration of that River into federal court, despite McCarran, further imposing a needless burden on the federal court system.